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IN THE

Supreme Court of the United States

October Term, 1961

No. 485

ALABAMA STATE BOARD OF EDUCATION, *et al.*,

Petitioners,

—v.—

ST. JOHN DIXON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the District Court (R. 208) is reported at 186 F. Supp. 945. The opinion of the Circuit Court of Appeals for the Fifth Circuit, and the dissenting opinion (App. A of Petition) are reported at —— F. 2d ——.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

I. Whether due process of law secured by the Fourteenth Amendment to the United States Constitution required notice and opportunity for hearing before respondent-students at a tax-supported college were expelled for misconduct.

II. Whether respondents were denied due process of law and equal protection of the laws, including the right to oppose by speech and assembly, state enforced racial discrimination, secured by the Fourteenth Amendment to the United States Constitution, under these circumstances:

Respondents, seven Negro students at Alabama State College, in orderly fashion requested service in the County Courthouse white-only lunchroom and were refused. Immediately, the petitioner Governor of Alabama and Chairman of the State Board of Education, publicly urged the College President to expel respondents.

The district court found that no particular respondent, but "several" of them, thereafter participated in meetings protesting racial segregation. At the President's request no further meetings were held on campus.

Without the customary notice or hearing respondents were expelled for alleged violation of a rule prohibiting conduct "prejudicial to the school" or "unbecoming" a student, a determination made without refernce to any definition of such conduct established before expulsion.

Statement

Respondents, six Negro students, prior to expulsion on March 5, 1960, attended all-Negro Alabama State College, operated by petitioners, and brought this action in the

United States District Court for the Middle District of Alabama, Northern Division, to enjoin school officials from further enforcing an expulsion order entered without customary notice and hearing.

The misconduct for which respondents were expelled was never definitively specified but followed their participation in a student protest against segregation at the Montgomery, Alabama courthouse lunch counter and alleged involvement in meetings protesting racial discrimination generally (R. 148-49).

As Negroes, respondents were denied service at the courthouse lunch counter, February 26, 1960 (R. 100, 104). Almost immediately Alabama's Governor retaliated. As Chairman of the State Board of Education, he summoned the President of Alabama State College, warned that such conduct would endanger the College's financial support and that the demonstrators should be dismissed (R. 76, 148).

On several days following publication in local newspapers of the Governor's dismissal order (R. 92) some—but not all—respondents participated in public meetings protesting racial discrimination: on February 26th, many students attended a trial in the Courthouse; February 27th there was a public meeting; March 1st, they attended a mass protest on the State Capitol steps (R. 211-213).

These public meetings were lawful and orderly; neither plaintiffs nor anyone else was charged with illegal conduct (R. 138-141). The College had no rule against participating in public meetings or requiring permission for such activity (R. 199). When the President requested that meetings not be held on campus, the students complied; respondents neither cut class nor violated any other College rule (R. 166, 116).

March 2, 1960 the State Board convened and on recommendation of the President, voted to expel nine students (including the six respondents) and to place 20 others on probation. While all Board Members did not vote for expulsion for the same reason, apparently a majority voted on grounds condemnatory of the lunch counter incident. The President, and at least one Board Member thought Negroes violated the law by requesting service at the lunch counter (R. 69, 156). Others believed that the request prejudiced the school (R. 187). Some relied on the President's report that respondents had violated a specific rule, or voted to expel on the basis of completely undefined events occurring prior to the lunch counter demand.

Respondents were notified of the Board action on March 4th or 5th, 1960 (R. 213-214), but prior to expulsion received no notice of charges. They were afforded no opportunity to explain or defend by College authorities or the State Board (R. 106), despite the College's informal but entrenched rule of granting hearings before expulsion (R. 57-58, 61-62, 63, 72). Moreover, respondents sought to be heard (R. 34, Exhibit B).

Seemingly, the Board acted on the basis of the President's report and recommendation (R. 214). However, it did not even purport to have direct knowledge of the facts, nor of which students attended the meetings. It had only the President's report that certain students were "ringleaders" of the demonstration (R. 213). The Board never heard the students' side (R. 106).

The District Court found that the students' request for lunch counter service, and that some of them attended anti-segregation rallies promoted disorder at the college, and justified dismissal. Holding that there is no constitutional right to attend a college, the court concluded: "the prevailing law does not require the presentation of formal charges

or a hearing prior to expulsion by the school authorities" (R. 221).

Respondents appealed; the Court of Appeals for the Fifth Circuit reversed, one Judge dissenting. For the majority, Judge Rives held: "In the disciplining of college students there are no considerations of immediate danger to the public or of peril to the national security which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense" (App. A of Petition, 19).

Argument

1. By determining that due process requires notice and some opportunity for hearing before students at a state college can be expelled for misconduct, the Court of Appeals merely required the procedural fairness usually and regularly provided by practically all public colleges, —— F. 2d ——, App. A of Petition, including Alabama State College until now (R. 57-58).

There is no issue as to whether tax-supported colleges may make their own reasonable rules about separating students. The question is whether petitioners may arbitrarily disregard general principles of due process and their own expulsion procedures, and without any notice or hearing whatsoever, dismiss respondents. The holding below merely accords respondents the same constitutional protection against arbitrary government action granted to organizations cited as subversive by the U. S. Attorney General,[1] aliens prior to deportation,[2] conscientious objec-

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[1] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 (Justice Black); 172-173 (Justice Frankfurter); 178 (Justice Douglas); 186-187 (Justice Jackson).

[2] Kwong Hai Chew v. Colding, 344 U.S. 590.

tors denied exemption by the Selective Service,[3] and persons denied state tax exemption for refusal to sign oaths not to advocate overthrow of the government.[4]

It also appears to be settled law that respondents should not be required to waive their right to due process as a condition to the granting of a privilege by the state. See *Shelton* v. *Tucker*, 364 U. S. 479, *Slochower* v. *Board of Education*, 350 U. S. 551, 555, *Wieman* v. *Updegraff*, 344 U. S. 183, 191-92, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.

Petitioners urge that a requirement of notice and some form of hearing is "unrealistic." Yet the Courts of Alabama have required hearings prior to the cancellation of teacher contracts, *State ex rel. Steele* v. *Board of Education of Fairfield*, 252 Ala. 254, 40 So. 2d 689 (1949); as a prerequisite to discontinuing telephone service, *Pike* v. *Southern Bell Tel. & Tel. Co.*, 263 Ala. 59, 81 So. 2d 254 (1955); prior to expulsion from a medical society, *Medical and Surgical Society of Montgomery County* v. *Weatherly*, 75 Ala. 248 (1883); and prior to expulsion from a labor union, *Local Union No. 57, etc.* v. *Boyd*, 245 Ala. 227, 16 So. 2d 705, 711 (1944).

The Court of Appeals correctly interpreted the authorities which have reviewed cases involving dismissal of students attending public colleges. While the notice and hearing provided by the schools in these cases generally was deemed adequate, no public college case cited by petitioners or found by respondents involved failure to provide notice or hearing prior to expulsion and none upheld failure of a college to provide this basic procedural safe-

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[3] Gonzalez v. U.S., 348 U.S. 407.

[4] Speiser v. Randall, 357 U.S. 513. See generally, Davis, Administrative Law Treatise, §§ 7.01-7.20 (1958).

guard in violation of its own usual practice. See opinion of the Court of Appeals (App. A of Petition).

The normal practice at Alabama State College had been to give hearing and opportunity to defend before expulsion. The President testified:

> A. We normally would have conference with the student and notify him that he was being asked to withdraw, and we would indicate why he was being asked to withdraw. That would be applicable to academic reasons, academic deficiency, as well as to any conduct difficulty.
>
> Q. And at this hearing ordinarily that you would set, then the student would have a right to offer whatever defense he may have to the charges that have been brought against him? A. Yes (R. 57-58).

Finally, in reversing the district court's dismissal of the case, the Court of Appeals did not order the respondents reinstated, but held only that their expulsion without notice or hearing denied due process of law. The standards suggested to provide the minimum of a fair hearing are consonant with those sustained in other cases of similar nature, and are not more onerous than procedure employed where other students faced disciplinary action at this college.

2. Should this Court grant certiorari, there would be presented the additional questions in this case which the Court of Appeals deemed it unnecessary to decide in view of its reversal for denial of a hearing prior to expulsion. The additional questions stem from the fact that the record clearly demonstrates respondents' expulsion was based upon their exercise of rights secured by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution:

(a) Petitioners had sought nonsegregated service at a public lunch counter in the county courthouse and

(b) they had participated in public meetings protesting racial segregation, The judgment below, therefore, is sustainable for the additional reason that petitioners made respondents' attendance at a public institution conditional upon abstention from the exercise of Fourteenth Amendment rights.

Such state action imposing unconstitutional conditions clearly violates the Fourteenth Amendment to the United States Constitution. See, *Slochower* v. *Board of Education of N. Y.*, 350 U. S. 551, 555; *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100; *Frost* v. *Railroad Commission*, 271 U. S. 583; *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494; *Southern Pacific* v. *Denton*, 146 U. S. 202; *Alston* v. *School Board of the City of Norfolk*, 112 F. 2d 992 (4th Cir. 1940), cert. denied 311 U. S. 693.

3. The writ of certiorari should be denied because the decision below was clearly correct. Moreover, there exists none of the other grounds which would support a grant of the writ, such as conflict of circuits, unsettled questions of federal law, conflict with decisions of this Court, or any other ground which the rules of this Court indicate are "special and important" (Rule 19, Revised Rules of the Supreme Court of the United States (1954)).

CONCLUSION

WHEREFORE, for the foregoing reasons the petition should be denied.

Respectfully submitted,

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